

EXHIBIT A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: ,

OPENAI, INC.,
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25 MD 03143 (SHS) (OTW)

Conference

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Before:

HON. ONA T. WANG,
Magistrate Judge

APPEARANCES

SUSMAN GODFREY LLP
Interim Class Counsel for Authors Guild and Alter Class
Actions
BY: ROHIT NATH

SUSMAN GODFREY LLP
Attorneys for The New York Times
BY: KATHERINE PEASLEE
ZACH SAVAGE
ALEXANDER P. FRAWLEY
ADNAN MUTTALIB
IAN CROSBY
DEMETRI BLAISDELL
ALEJANDRA C. SALINAS
DAVIDA BROOK
ROHIT NATH
JUSTIN NELSON

ROTHWELL FIGG
Attorneys for New York Times and Daily News
BY: JENNIFER MAISEL
STEVEN LIEBERMAN
JENNY COLGATE

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APPEARANCES (Continued)

LOEVY & LOEVY

Attorneys for Center for Investigative Reporting

BY: MATTHEW TOPIC

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Attorneys for Authors Guild and Alter Class Plaintiffs

BY: RACHEL GEMAN

WESLEY DOZIER

BOIES, SCHILLER FLEXNER, LLP

Attorneys for N.D. Cal Plaintiffs

BY: JOSHUA M. STEIN

EVAN EZRAY

JOSEPH SAVERI LAW FIRM

Attorneys for Plaintiffs

BY: CHRISTOPHER YOUNG

KEKER VAN NEST & PETERS

Attorneys for OpenAI

BY: JAMES SLAUGHTER

MICHELLE YBARRA

ANDREW DAWSON

CHRISTOPHER SUN

SARAH SALOMON

BILAL MALIK

EDWARD BAYLEY

MORRISON & FOERSTER LLP

Attorneys for OpenAI

BY: JOSEPH GRATZ

CAROLYN HOMER

ROSE LEE

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APPEARANCES (Continued)

LATHAM & WATKINS LLP
Attorneys for Microsoft
BY: ELANA NIGHTINGALE DAWSON

FAEGRE DRINKER BIDDLE & REATH LLP
Attorneys for Microsoft
BY: JARED BRIANT

ORRICK HERRINGTON & SUTCLIFFE LLP
Attorneys for Microsoft Corporation
BY: ANNETTE L. HURST
SHERYL GARKO

ALSO PRESENT: KAREN CHESLEY, The New York Times

NICK STANDISH, The New York Times

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1 THE COURT: Okay.

2 MS. SALOMON: Understood, your Honor.

3 THE COURT: Rubin, are we done with Rubin?

4 MS. SALOMON: I believe we're done with Rubin.

5 If I may, your Honor, I would request a denial without
6 prejudice, so that we could explore these issues in deposition.

7 THE COURT: Sure.

8 MS. SALOMON: Thank you, your Honor.

9 THE COURT: I will add, however, for all three of
10 these custodians is a denial without prejudice to renewal, but
11 when you renew, if you renew, I need to see specific
12 allegations, specific documents, statements, admissions that
13 indicate that these custodians are non-cumulative,
14 non-duplicative responsive documents, and that it's
15 proportional to the needs of the case.

16 I will consider Rule 37(e)(5) in cost shifting, but it
17 is denied without prejudice.

18 All right. Showing, again, that I'm a terrible judge
19 of time, let's see, the next issue is, since we're talking
20 about documents, what about document 250, 251?

21 MR. YUE: Good afternoon, your Honor. Herman Yue from
22 Latham & Watkins, on behalf of OpenAI.

23 I'll be speaking to the request that CIR add an
24 additional five custodians to its existing list of the
25 custodians. Just as an overview, these five custodians we've

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1 identified are going to be relevant to 15 requests for
2 production, and these RFPs are going to be to issues such as
3 ownership of asserted works, whether OpenAI allegedly actually
4 will move to CMI from those asserted works, CIR damages claims,
5 and a number of defenses that OpenAI has asserted.

6 Now, the letter we received at the time we had
7 submitted that, we have not received the bulk -- or just
8 received the bulk of CIR's production. Since that time, we
9 have received approximately 90 percent of CIR's production, and
10 we've taken heed of what CIR has asked us to do. And we have
11 done our very best to triage and review those documents. And
12 what we've seen from those documents reinforces the evidence we
13 obtained from the custodial deposition of Ms. Bowerman, CIR's
14 CEO.

15 And our review of the documents demonstrates that
16 there are, in fact, large swaths of documents for which CIR has
17 not produced responsive documents, and based on the deposition
18 testimony from Ms. Bowerman, we believe that the custodians or
19 the requested custodians that we've identified in our motion
20 should be in possession of those documents.

21 Now, I just want to address a few points that CIR has
22 made in its responsive briefing. It's repeatedly said or
23 repeatedly urged that, you will engage in manual collection of
24 documents, and that that should obviate any need to add those
25 additional custodians. But, respectfully, your Honor, this is

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1 really the exception that swallows the rule.

2 They have made this suggestion for four out of the
3 five custodians that we have suggested, but, of course, this is
4 inconsistent with the fundamental premise of the ESI order that
5 your Honor entered, which was all about identifying custodians,
6 identifying search terms, and using that as the primary method
7 of obtaining and producing documents. So, that simply can't be
8 the answer.

9 Now, they've also pointed out the fact that CIR is a
10 smaller organization, and they've pointed out the fact that CIR
11 has identified as existing custodian certain decision makers.
12 And we don't take issue with those representations, but the
13 fact is, as I think your Honor can well recognize, that
14 sometimes the decision makers, the CEO, the CFO, they're not
15 necessarily going to be the individuals with all of the
16 responsive documents. So the custodians that we have
17 identified in our motion are individuals which we believe,
18 based on the deposition testimony, and what we have seen from
19 the documents, should have responsive documents.

20 THE COURT: Okay. I want to respond right here and
21 note that I just heard arguments from your colleague that they
22 want the people at the higher level, because they're the ones
23 that can see everything, and now you're making the argument
24 that is contrary to that, which is that the higher level people
25 probably don't have all of those documents, but the lower level

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1 people, who are actually on the ground, boots on the ground,
2 working on these issues, probably do have these documents.

3 Which is it? We're not getting all of it.

4 MR. YUE: Understood, your Honor, and these are two
5 different organizations, and these are two different types --
6 well, more than two, obviously, but these are different types
7 and classifications of documents.

8 As Ms. Salomon was up there, I recognized you might
9 raise that specific tension, but I don't think there is any
10 tension. I think this is a matter of apples versus oranges,
11 two different situations, and the types of documents we have,
12 and the types of documents we don't have.

13 THE COURT: Okay. Why don't you name the five
14 custodians, and tell me what you think they have or why they
15 should be added, what their responsive documents are going to
16 be, and I'll have CIR respond.

17 MR. YUE: Sure. So there's five individuals. The
18 first one is Mr. Robert Weiss. He is the director of online
19 technology, and we believe he's going to have documents
20 relevant to exclusion protocols and CIR's policies relating to
21 the addition of copyright management information, or CMI, to
22 its asserted works. And this goes to the DMCA claim that
23 they've asserted against us.

24 THE COURT: I got that.

25 MR. YUE: And so during the custodial --

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1 THE COURT: Next custodian.

2 MR. YUE: Okay. The next one is Marla Jones Newman.
3 She's the vice president for people and culture. We believe
4 she's going to have documents such as employment agreements and
5 work-for agreements that are going to go directly to ownership
6 issues of the asserted works.

7 THE COURT: Next.

8 MR. YUE: Next is Ms. Emily Harris. She is the
9 director of finance at CIR, and she is going to have documents
10 that are going to be relating or underlying CIR's financial
11 analysis of its two publications, Mother Jones and Reveal.

12 THE COURT: Okay.

13 MR. YUE: The fourth custodian is Ruth Murai. That's
14 spelled --

15 THE COURT: Sorry. Let me go back to Emily Harris.
16 So, financial analysis as the director of finance. What does
17 that get to?

18 MR. YUE: That gets to evaluation documents. That
19 gets to their views and their analysis of any alleged harm that
20 CIR suffered as a result of OpenAI's alleged activities. So it
21 just goes to general harm issues, damages.

22 And the fourth factor of the various defense --

23 THE COURT: Okay. Is this similar to the New York
24 Times' assertion that the use of OpenAI's tools reduces
25 subscriber demand, or anything like that, or is it something

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1 different?

2 MR. YUE: It could be. It could encompass that.

3 At this point, your Honor, what we have are some high
4 level, sort of final financial analyses, summaries, but we
5 don't have any of the underlying documents that support that
6 analysis and that's what we're looking for. And that's why
7 we're looking for somebody like Ms. Harris, who, again, during
8 the custodial deposition, CIR's representative indicated she
9 would be responsible for actually leading the team that
10 conducts the analysis and generates the final analysis that the
11 VP of finance would have.

12 THE COURT: Okay. But you have the final analyses.

13 MR. YUE: We have some of them, your Honor. We don't
14 have a complete collection, but what we are missing, which is
15 in our view a large enough chunk, are any underlying documents.
16 So we have no way of sort of pressure testing those final
17 numbers, if you will.

18 THE COURT: What do the final numbers say that matters
19 for your client?

20 MR. YUE: Well, the final numbers indicate changes in
21 revenue that CIR has experienced over the years, licensing
22 revenues, subscription revenues, advertising revenues. These
23 all go to potential harms. So to the extent that they're going
24 to bring those numbers in and say, hey, this demonstrates harm
25 as a result of OpenAI activities, we want to pressure test

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1 those numbers, and we don't have the documents right now that
2 would enable us to do that.

3 THE COURT: Okay. The next person was Ruth --

4 MR. YUE: Ruth Murai, M-u-r-a-i.

5 THE COURT: Okay. Talk to me about Ms. Murai.

6 MR. YUE: So, we believe Ms. Murai has documents
7 relating to CIR's plagiarism detection efforts, and that's
8 going to include monitoring for the use of third-party works,
9 or generative AI in the creation of its works in Reveal and
10 Mother Jones.

11 THE COURT: So it's CIR's own plagiarism detection for
12 works that it publishes?

13 MR. YUE: Correct.

14 THE COURT: Okay. I'll let I guess Mr. Topic address
15 how or why that's responsive in a moment.

16 So, this is to detect use of tools like ChatGPT.

17 MR. YUE: Correct, your Honor. It also includes, for
18 example, the use of third-party works. If you look at the
19 publications from Mother Jones and from Reveal, CIR's two
20 publications, you'll see that the citation and the quotes and
21 the use and the attributes of third-party works is quite
22 consistent. And to the extent that it is not properly
23 attributing third-party works in its publication, that's
24 certainly relevant along, as you indicated, the use of
25 generative AI.

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1 THE COURT: All right.

2 MR. YUE: And one last one, your Honor.

3 THE COURT: Okay.

4 MR. YUE: The last one, what we asked for here are
5 senior editors that are in possession of documents relating to
6 use of third-party works. We've identified one individual in
7 particular based on the custodial deposition. That
8 individual's name is Michael Mechanic, and we believe that he
9 has documents related to CIR's arrangements for the use of
10 third-party works.

11 So, these are going to be arrangements with
12 third-party content sources, and, as well, arrangements with
13 such third parties regarding the sharing of CIR's own content
14 to those third parties.

15 THE COURT: Okay. These are holes that you've seen in
16 the production from CIR to date?

17 MR. YUE: Correct, your Honor.

18 THE COURT: All right. Well, let's hear from CIR.

19 MR. TOPIC: Good afternoon, your Honor. Matt Topic,
20 on behalf of CIR.

21 In terms of these alleged holes, let me go over the
22 chronology. They filed this letter brief in early April.
23 Haven't heard anything from them since at all. In the
24 meantime, we've doubled the size of our production. So I've
25 said repeatedly, if they want to confer about specific things

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1 they think I'm missing, I'm happy to have that discussion.

2 They have not --

3 THE COURT: Let me pause you here. One distinction
4 from the custodians' argument that we have just heard is this
5 is new, or new to me.

6 MR. TOPIC: Well, I haven't been given any opportunity
7 to confer with them about whether or not these are really
8 holes. I don't even know who else he's talking about. He just
9 described in a vague level, with no advanced warning of what
10 those alleged are. With that, I'm happy to go through the five
11 custodians that he's identified.

12 THE COURT: Sure. Well, I think what I'd like to hear
13 is go through the custodians identified, but also juxtapose it
14 with the custodians that you are -- that you are reducing from,
15 and tell me whether or not there is this overlap.

16 MR. TOPIC: Right. And we walked through those in the
17 letter brief as well, but let me first say we've given them our
18 CFO, our CEO, and VP of sales, who cover collectively the
19 waterfront areas in this case. So this is a function of them
20 wanting to fish around in lower level peoples' documents and
21 see if they can find something there.

22 So Mr. Weiss, they identified exclusion protocols in
23 policies on applying copyright management information to our
24 website. In fact, Ms. Baldwin testified that she is
25 responsible for the policies about whether to deploy CMI on the

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1 website.

2 At the end of day, what matter is, is it on the
3 website or isn't it. So I don't think it's a legitimate area
4 that there's going to be any dispute or really any need to
5 explore.

6 As to the exclusion protocols, what would be relevant
7 is the extent to which we've applied them, and maybe what's
8 relevant is why we applied them. Those things are covered by
9 the CEO. The person that actually put the code into the
10 computers to implement it, that's not really relevant, and
11 that's what they're looking for. The person typing the things
12 into the computer to implement what the custodians we've
13 identified are making the decisions about.

14 Jones Newman, we've identified employment agreements.
15 We are manually collecting employment agreements. We have them
16 in several repositories. We don't need to mine those out of
17 people's emails, so there's really no reason to be adding a
18 custodian for a document of that sort.

19 Harris is the director of finance. We've already
20 given them the CFO, who is who the director of finance reports
21 to. The financial analyses, discussions of the financial
22 analyses, they would have those kind of things.

23 Murai, for plagiarism detection. I feel pretty
24 confident in saying that if it turned out that anyone
25 identified any plagiarism in any of our documents, our CEO

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1 would know about it within about six seconds. So to go through
2 the person who's doing the fact checking, getting their
3 documents, it's all redundant. If it turned out that, yes, we
4 used AI in generating one of our works -- I am not saying that
5 is the case. I don't believe that is the case, but that would
6 make its way up to our CEO, so there's no reason to collect
7 that from a lower level employee.

8 The last person was Mechanic. As to publication
9 agreements, just like for employment agreements, we are
10 manually collecting agreements.

11 So I think that covers all the different custodians
12 they've identified. I am more than happy to discuss with them
13 any specific holes they've identified. Our production is not
14 yet complete. It should be complete in the not-too-distant
15 future. And, again, half of it was produced after they
16 provided this letter, and this is the first I've heard of any
17 holes.

18 THE COURT: Okay. Employment agreements, can you give
19 me a sense of how many you're collecting, you're manually
20 collecting?

21 MR. TOPIC: Well, let's keep one thing in mind. It is
22 very much in our interest to produce those. We have to show
23 that we own the works, right? So we're going to need to show
24 the work was written by someone who was an employee. So if
25 they had an employment agreement, we would want to provide it.

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1 Some of these people may not have an employment agreement. It
2 may be an offer letter. It may be payroll records. But all
3 these things people are manually collecting, because people's
4 emails are not a natural repository for those types of things.

5 THE COURT: Then, talk to me about the communication
6 agreements. I just want to understand what we're talking about
7 here, because I understand CIR to be a very different party in
8 terms of nature, size, scope from, say, Innertec.

9 So, as far as employee agreements, or if there's other
10 records of somebody being paid, or being an employee, are we
11 talking about dozens, hundreds, thousands, tens of thousands?
12 What are we talking about here?

13 MR. TOPIC: Order of magnitude, I would say we're
14 probably talking about dozens, maybe low hundreds of authors I
15 would think, but I'm just speculating. I don't have the actual
16 numbers.

17 THE COURT: Okay. What about publication agreements?

18 MR. TOPIC: I don't know the magnitude of what we're
19 talking about, but those should be consolidated in one place
20 where we would be looking for them.

21 THE COURT: Okay. So they're usually consolidated in
22 one location, so it makes sense for manual collection.

23 MR. TOPIC: I'm not going to say only one. It may be
24 a couple. But the kind of thing that's very conducive to going
25 to the folder that has the documents in it, pull the folder,

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1 and produce the documents.

2 THE COURT: All right. In the interest of moving this
3 forward a bit, I'm going to tell you all to meet and confer and
4 try to make this a dead issue, or a non-issue based on the
5 arguments that we've heard, the discussion we've heard. I want
6 there to be a more robust conversation about what holes are,
7 what constitutes a hole, how you know that there's a hole
8 versus the proposed custodian just doesn't have documents of
9 that type.

10 This goes for both the CIR custodians, proposed
11 custodians, as well as the Times custodians. I think that's
12 what you could gather from the nature of my questioning, is
13 that I really need to see a little bit more than just, we
14 didn't get very much from this person, so they must have more.
15 It could also be that they just don't have that much. There's
16 got to be a way to make that distinction. Okay?

17 MR. TOPIC: Thank you.

18 MR. YUE: Thank you, your Honor.

19 THE COURT: All right.

20 MS. YBARRA: Your Honor.

21 THE COURT: Yes.

22 MS. YBARRA: Michelle Ybarra for OpenAI.

23 I know we had discussed addressing perhaps OpenAI's
24 final negotiating against the Times -- I wanted to alert the
25 Court it is almost 4:00. We wanted to take up the preservation

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1 issue today.

2 THE COURT: Let's take a break then. Ten minutes. We
3 will switch gears. All right.

4 (Recess taken)

5 (Continued in separate transcript)